

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 15, 2006 Session

STATE OF TENNESSEE v. EDGAR BAILEY, JR.

Direct Appeal from the Criminal Court for Hamilton County
Nos. 251786, 245704, 245706 Rebecca J. Stern, Judge

No. E2005-02186-CCA-R3-CD - Filed December 27, 2006

The defendant, Edgar Bailey, Jr., was convicted of first degree premeditated murder and felony murder, which the trial court merged together; three counts of aggravated assault, Class C felonies; and setting fire to personal property, a Class E felony. He was sentenced to life imprisonment for the murder conviction, five years for each aggravated assault conviction, and eleven months, twenty-nine days for the setting fire to personal property conviction, with all sentences to be served concurrently. On appeal, he argues: (1) the trial court erred in denying his motion to suppress; (2) the evidence is insufficient to support his convictions; (3) the trial court erred in allowing expert testimony from a police officer; (4) the trial court erred in allowing a witness's tape-recorded statement after the witness testified that he could not recall the incident; (5) the trial court erred in allowing a photograph of the deceased victim into evidence; and (6) the trial court erred in not instructing the jury on the natural and probable consequences rule for first degree murder and felony murder. Following our review, we reverse the conviction for first degree premeditated murder and remand for a new trial; affirm the remaining convictions, including that for felony murder; and remand for resentencing as to the conviction for setting fire to personal property because the trial court erroneously considered the offense a Class A misdemeanor, rather than a Class E felony.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part,
Reversed in Part, and Remanded**

ALAN E. GLENN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., joined. GARY R. WADE, P.J., not participating.

Melanie R. Snipes, Cartersville, Georgia (on appeal and at trial); and Wade Hinton, Chattanooga, Tennessee (at trial), for the appellant, Edgar Bailey, Jr.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William H. Cox, III, District Attorney General; and Boyd M. Patterson, Jr. and Bates W. Bryan, Jr., Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

The Hamilton County Grand Jury indicted the defendant and two codefendants, Muhammed Nuriddin and Jereme Little, for first degree premeditated murder, first degree felony murder, and conspiracy to commit first degree murder for the killing of twenty-one-year-old Anthony McAfee on June 20, 2001. Additionally, the defendant and Nuriddin were indicted for setting fire to personal property (the victim's automobile), and the defendant was indicted for three counts of aggravated assault for firing a weapon at three occupants of a van as they drove by the scene of the car fire. The jury convicted the defendant of all charges except the conspiracy to commit first degree murder, and the trial court merged the first degree premeditated murder and first degree felony murder convictions.

Suppression Hearing

In November 2004, the defendant filed a motion to suppress certain evidence, including approximately \$9408 in cash and a cellular telephone, seized from him by Chattanooga police officers. At the pretrial motions hearing, Detective Bill Phillips of the Chattanooga Police Department testified that when he arrived at the homicide scene on Newell Street, the duplex being rented by Marquis Gardner and his girlfriend, he found the victim's body in the living room. Gardner told him that Nuriddin had been there the prior evening "sizing up"¹ the victim. Gardner also said that the defendant, Nuriddin, and Little had been together that night and that "he felt they were the ones that killed [the victim]." Asked if he knew that the defendant drove a black Monte Carlo, Detective Phillips said, "I had been told that in other investigations." Officer Galen Fugh arrived on the scene and told Phillips that, while working in an area one street over, he had seen a black Monte Carlo with dark-tinted windows during the time of the homicide. Detective Phillips subsequently received a call about the victim's burned car on Harrison Pike and was informed that, while fleeing that scene, the driver of a black Monte Carlo with dark-tinted windows had shot at a van driven by Kimberly Morgan. A "BOLO," or "be on the lookout for," was then issued for the defendant and his vehicle. The defendant was subsequently located at a nearby gas station and detained for further investigation. Detective Phillips acknowledged that the defendant's vehicle, money, and telephone were confiscated on June 20, 2001, but he was not charged until two years later.

Officer James Avery of the Chattanooga Police Department testified that he and another officer who was training him at the time saw the defendant's vehicle, which fit the description of the car in the BOLO, parked at a gas station pump at 23rd and Dodds Streets. The officers parked their patrol car behind the defendant's vehicle. As the defendant got out of his car and walked toward the

¹ Asked to explain the term "sizing up," Detective Phillips replied, "I took it to mean that [Nuriddin] was seeing how much money [the victim] had but I asked [Gardner] and that's what he told me."

officers, Avery saw a “big wad of money”² in one of the defendant’s pockets. The officers called for the major crimes unit to respond to the scene.

At the conclusion of the hearing, the trial court denied the motion to suppress, finding that the officers had probable cause to arrest the defendant and that the search of the defendant was incident to his arrest.

Trial

At the December 1-4, 2004, trial, Marquis Gardner testified that the victim was a “real good friend” of his and that he had known the defendant since childhood. Gardner said that, the day before the murder, the victim came to his house and was “counting his money” in the kitchen when Nuriddin³ arrived. After the victim left, Nuriddin told Gardner that everyone knew the victim was there with “a lot of money.” The victim called Gardner later that night, and they “rode around for a minute and chilled.” They drove by Buffalo Wild Wings but did not go inside. Gardner took the victim back to Gardner’s house around 11:30 p.m. and then went to Shawn Terry’s house where he stayed until approximately 4:00 a.m. When he arrived back at his house, Gardner noticed that the door was ajar, and inside he found the victim’s body wrapped in some blankets “like somebody fixing to try to take him out of the house.” The living room was in disarray, and the walls were smeared with blood. Gardner said he knew that the victim was dead because “he wasn’t budging or moving, like he been dead.” He acknowledged that he did not check the victim’s pulse or check to see if he was breathing. Gardner called his girlfriend and went to his grandmother’s house because he “needed somebody to be there with [him].” He then called the police and told them that he knew “what was going on, it ain’t no mystery. . . . I know who did it. My cousin [Nuriddin] is the only one that came over my house. I had just moved there. It’s not a mystery.” He also told the police about the black Monte Carlo and tried to tell them how much money the victim had but did not know the exact amount. Asked why he waited thirty minutes to call the police to report the murder, Gardner said, “[The victim] was dead. . . . [H]e was froze.”

Gardner said that he and the victim were “involved in cocaine” and that he was a member of a gang. He said that, on the day of the murder, he had paid the victim \$5000 and owed him an additional \$2000 for drugs. According to Gardner, the victim had come to Chattanooga that day to collect money from him and others. Although other people knew the victim was in town, only Nuriddin knew that he was at Gardner’s house. Gardner denied that he had anything to do with the murder. Asked if he was speculating that Nuriddin was the killer, Gardner said, “Ain’t no speculating, I know who did it. He is the only one that came to my house. It ain’t no probably, no speculating. I know he did it, he is the only one that came over there. It ain’t no mystery.”

²Officer Avery said he did not take the money out of the defendant’s pocket but later heard that the defendant had approximately \$7000.

³Gardner testified that Nuriddin is his cousin.

Officer Galen Fugh of the Chattanooga Police Department testified that while conducting a traffic stop around 1:30 a.m. on June 20, 2001, on Carson Street, which was one block from Newell Street, he saw a black Monte Carlo. He said he noticed the Monte Carlo because “it looked good and sound[ed] good” and had tinted windows and shiny rims. Officer Fugh saw the Monte Carlo again around 3:00 a.m. on North Orchard Knob in the same area as Carson and Newell Streets. He said that while he was at the scene of a car fire on Harrison Pike, he was called to the murder scene on Newell Street. As he went inside the front door, Officer Fugh saw the victim’s body lying on the floor and a small bag of marijuana on a green table. He also noticed that “the side door had been kicked in, the lock and stuff was busted.” Gardner told Officer Fugh that the last time he had seen the victim was around 1:30 and that the victim’s car, which Gardner described as gray with Georgia tags, was missing. Fugh said that the car that was burned on Harrison Pike also was gray and had Georgia tags.

Kimberly Morgan testified that on June 20, 2001, she was working for Cimarron Coach, a transportation company that contracts with Norfolk Southern Railroad to drive train personnel from the train to their hotel rooms in Hamilton County. Early that morning, as she was driving railroad employees in a van down Harrison Pike, she saw a car that was on fire and a dark-colored Monte Carlo with dark-tinted windows parked in front of the burning car. As Morgan approached the burning car to see if anyone needed assistance, “two guys ran and jumped in the other car that was parked in front of the burning car and took off. . . . [T]hey went maybe twenty, thirty yards, and then gunshots started getting fired like towards the van.” She said that because she was “sitting up in the van high,” she could see the driver of the car and that they were close enough they “probably could have slapped each other.” She described the driver as a “big guy” with a tattoo or some kind of marking at the top of his shoulder. She said he was wearing blue jeans but no shirt and had distinctive hair, explaining that she could see his scalp. After the shots were fired, Morgan “took off.” The tape recording of Morgan’s 9-1-1 call was played for the jury. Morgan said she identified the defendant in a photographic lineup but was unable to do so in a physical lineup. Morgan identified the defendant in court as the driver of the car.

Steve Maddox, an engineer for Norfolk Southern Railroad, testified as to the events that transpired at approximately 3:30 a.m. on June 20, 2001: “Oh, just got in the van, headed to the motel, seen a car on fire, didn’t have a fire extinguisher, seen another car there and then we left and went to the motel.” After acknowledging that he did not have a clear memory of the incident, Maddox’s prior statement to the police was played in court. In his statement, Maddox said that he and another passenger, Michael Holloway, were riding in the transportation van being driven by a woman. En route to their hotel, they saw a gray or silver car that was on fire and a shiny, black Monte Carlo with black tinted windows parked in front of the burning car. Maddox related what happened as they approached the burning car:

We pulled up aside that car that was sitting in front of the burning car and we seen [sic] two people scrambling. The driver, he ducked down like he was crawling or crouching behind his door, got in the car. . . . They pulled off without their lights on. They went approximately a hundred feet, a hundred fifty feet, and they were looking

at the car and I was watching them and they turned just sideways in the road and opened the car door. . . . I seen the flash and they fired twice but I didn't see the second one, I ducked down.

Maddox described the person he saw getting in the driver's side of the Monte Carlo as "a black guy with a real muscular build. He didn't have a shirt on." Maddox said the driver of the Monte Carlo got out of the vehicle and fired in the direction of the van in which he was riding. On cross-examination, Maddox said he recalled "bits and pieces, but not a whole bunch" about the incident. He said he remembered asking for a fire extinguisher, driving off, ducking from the shots, and seeing a black car.

Michael Holloway, an employee of Norfolk Southern Railroad, testified that as he was being transported from the railroad by a Cimarron van around 3:30 a.m. on June 20, 2001, they encountered a burning car. He also saw a dark-colored car with tinted windows and saw movement in the car before it sped away. He said that when shots were fired, everyone in the van ducked down. He acknowledged that he did not get a good look at the people he saw by the fire, saying he only saw "little movements or like a little silhouette."

Craig Haney, a fire investigator for the Chattanooga Fire Department who was accepted by the trial court as an expert in the field of cause and origin of fires, testified that he investigated the fire of an automobile on Harrison Pike on June 20, 2001. When he and Lieutenant Reginald Clark arrived on the scene, they found a 1994 Buick with extensive fire damage to the trunk area and a can of lighter fluid in the rear floorboard of the vehicle. After digging through the debris, they could not find any acts indicating an accidental source of ignition of the fire. Investigator Haney opined that the fire "was started with an accelerant by human hands." Four samples from the vehicle were collected and sent to the Tennessee Bureau of Investigation ("TBI") Crime Laboratory for testing. Two of the samples tested positive for an accelerant.

Alta McAfee, the victim's mother, testified that the Buick automobile that was burned belonged to her. She said she had loaned the car to the victim for his trip to Chattanooga.

Shawn Terry testified that Marquis Gardner came to her house between 11:30 p.m. on June 19, 2001, and 1:30 a.m. on June 20, 2001, and stayed until about 4:30 a.m.

Officer Jerome Halbert of the Chattanooga Police Department testified that he responded to the murder scene on Newell Street and upon his arrival, he noticed that the front door was slightly open. He said that Gardner told him that Nuriddin had been to his house the day before and was "sizing up" the victim. Halbert agreed that the BOLO for the defendant and the black car was issued, in part, as a result of what he discovered about Nuriddin's association with the defendant. Halbert identified photographs of the murder scene depicting bloodstains on the ceiling and wall, a radio with blood smear, and blood spatter above the couch.

Mary Bangs testified that in June 2001 she was employed as a subpoena compliance specialist at PowerTel Incorporated, a wireless telephone company. She identified a contract and telephone records that she provided to the Chattanooga Police Department.

Sharon Gardner, Marquis Gardner's mother and codefendant Nuriddin's cousin, testified that Nuriddin's phone number as shown in her date book was 314-3255 and that his nickname was "M Lope."

Lieutenant Mike Mathis of the Chattanooga Police Department testified that he responded to the scene of the murder at approximately 6:22 a.m. on June 20, 2001. He subsequently went to the intersection of Dodds and 23rd Streets where the defendant was being detained. The defendant's vehicle was confiscated and towed to the crime scene unit processing bay, and the defendant was transported to the major crimes division office where Mathis interviewed him at about 12:40 p.m. after advising him of his rights. The defendant told Mathis that he had been at home asleep alone and that he had been with Nuriddin the previous night at Buffalo Wild Wings. The defendant said he dropped Nuriddin off on 12th Avenue around 1:00 a.m. and arrived home around 1:30 a.m.

Lieutenant Mathis said that a large amount of cash and a cellular telephone were recovered from the defendant. Mathis identified telephone records for the phone the defendant had in his possession, as well as records for the phone numbers that "reflect[ed] back" to Nuriddin and Gardner. He said the number he had for Nuriddin was "area code 423 314-3255."

Officer Ed Duke of the Chattanooga Police Department testified that he videotaped and diagramed the scene of the murder and dusted for fingerprints. He also discovered a projectile in a sheet. Another officer collected two hammers and the blanket that the victim's body was wrapped in. Officer Duke said the side door was damaged and had shoe impressions as if it had been kicked in.

Detective Timothy Commers of the Chattanooga Police Department testified that he arrived at the murder scene at 6:18 a.m. and observed the kicked-in door and the footprints on the door. He collected a paring knife found on the couch, the blanket the victim's body was wrapped in, and two hammers. He also made a cast impression of a footprint discovered in some dirt at the scene and transported the defendant's clothes and shoes to the laboratory for testing. He performed a gunshot residue test on the defendant on June 20, 2001, and sent the samples to the laboratory for testing. Reading from the TBI reports as to the gunshot residue kit collected from the defendant, Commers said, "Elements indicative of gunshot residue were absent. These results cannot eliminate the possibility that the individual could have fired, handled or was near a gun when it fired."

Sergeant Craig Johnson testified that he responded to the murder scene on June 20, 2001, and, two days later as part of his follow-up investigation, made photographs of the roadway and railroad crossing on Harrison Pike. He identified photographs depicting "scrapes and gouge marks in the pavement just past the tracks" as well as skid marks. He also made photographs of the

undercarriage of the black Monte Carlo which showed “fresh scrapping of metal on the . . . support piece underneath the engine and also some tubular stabilizers or support rods that are attached to it.”

Investigator Joe Warren of the Chattanooga Police Department, a certified accident reconstructionist accepted by the trial court as an expert in that field, testified that he reviewed the photographs taken of the roadway and railroad tracks and went to the scene of the roadway with another officer. He said that there were “some fairly fresh” tire marks and some “very fresh” gouge marks on the roadway and that he made measurements of the roadway, the gouge marks, and the tire marks. He determined the “inside width of the tire marks, the inside track, the inside of the tire to the inside of tire to be four foot, four inches.” The deeper parts of the gouge marks were about two and one-half inches apart and the wider portion measured about eight or nine inches wide. He acknowledged that he did not examine the Monte Carlo but said he reviewed the photographs of the undercarriage of the vehicle. Through his review of the photographs, Investigator Warren determined that there was “fresh scraping” on the undercarriage, explaining that there was no surface rust or roadway grime on the shiny portions where the metal had been exposed. His measurement of the bolt heads showed that they were two and one-half inches apart “which correlate[d] with the two and a half inches apart and the deeper gouge marks that [he] found in the roadway.” During his review of the photographs, he also noticed “some dark markings where the tire had rubbed up against the inside of the wheel well,” explaining that that only occurs when the suspension has been fully compressed. Asked his opinion as to what caused the gouges and marks in the roadway, Investigator Warren testified:

It is my opinion, based on the photographs of the vehicle that I viewed, and based on the scene that I measured where we did take specific painstaking measurements on the gouge marks, the distance apart, taking into account the location of that, taking into account the freshness of the gouge marks on the roadway and the freshness of the scrape marks that appeared to be on the engine cross member of that vehicle, it’s my opinion that vehicle created those gouge marks within a week or so of that happening, within a few days, something along those lines.

On cross-examination, Investigator Warren said that his knowledge of metal corrosion came from his prior experience in the auto body repair business. He said that one vehicle can create several different gouge marks. He acknowledged that different conditions, including lighting, can cause photographs to appear differently.

Brian Herman testified that he was currently incarcerated in a federal prison for possession of cocaine for resale and that he had known the defendant for ten to fifteen years. He said he saw the defendant at a club the weekend before the murder, and the defendant asked him if he had a gun and if he had seen “Trick Face.” The defendant told him to “watch Trick Face and you will know what’s going on.” On the night of the murder, when Herman arrived home in Chattanooga between 9:30 and 10:00 p.m., the defendant’s black Monte Carlo was at his house but was gone the next morning when he awakened. When Herman talked to the defendant later that day, the defendant told him he was in Atlanta. Herman asked the defendant why he had left his car at Herman’s house, and

the defendant said, "I am straight folk. When I come back to Chatt[anooga], you know, I straight or whatever. You know, if you see Trick Face don't say nothing to him because I think he is snitching. That Tony Mac boy he through, he'd dead, he's 'stanking,' he's gone." Herman later went to his recording studio where the defendant and Little were "recording a song about killing somebody, running somebody off the road up in the ditch." When Herman asked the defendant why he was recording such a song, the defendant told him, "[W]e killed for real, (phonetic) we ain't playing. Won't we just rap about it. We killed us for real." The defendant explained Little's role: "[H]e was like, my soldiers right here, we ain't playing, you know, we killed us a real 'em (phonetic), my soldiers took care of that. [Little], J Rock, M Lope (phonetic), you know what I'm saying, Elope (phonetic), we ain't playing. We kill anybody."

On cross-examination, Herman said that he was currently serving a twenty-three-year sentence and acknowledged that he was testifying in the defendant's case to help himself "[i]n a certain extent" but said he had not been promised anything in exchange for his testimony. He recalled giving a statement to Detective Halbert on October 9, 2003, in which he said that he was at a club with the defendant on the night of the murder. However, Herman said that he had been confused "because it was like . . . the weekend . . . this right here happened the weekend before, like the Saturday going into the Sunday morning. The murder happened on Tuesday." He acknowledged that he had prior convictions for possession of cocaine, felony theft of property, carrying a dangerous weapon, and aggravated assault.

Justin Hill testified that he was currently incarcerated in Louisiana for "[c]onspiracy to armed robbery" and that he knew the defendant and the victim. When he and the defendant were being transported on a federal van "[b]ack in December," the defendant told Hill "about the murder he was involved with. He told me that him and his friends, Jerome Little and Muhammed [Nuriddin] went to rob [the victim] and Mr. Little and Mr. Muhammed went in the house and proceeded to rob him. One of them stuck him and Mr. Little shot him in the head." The defendant told him that Nuriddin was the one who stabbed the victim and that after Little shot the victim, they drove the victim's car away from the scene and burned it. Hill acknowledged that he had prior convictions for attempted murder and conspiracy to commit robbery. He denied that he had heard "around the streets through Trick Face" that the defendant was involved in the murder of the victim. He said he had not been promised anything in exchange for his testimony.

Eugene Coleman testified that he was currently serving a fourteen-year sentence in a federal prison for drug trafficking and that he had known the defendant for about twenty-one years. He said that the defendant told him that Nuriddin went to "Trick Face's" house the day before the murder and saw the victim counting money. The defendant told Coleman that he drove Little and Nuriddin to the house where the victim was and that Little and Nuriddin went inside and robbed him of about \$27,000. The defendant also said that the murder "only took five minutes" and that "they messed him up real bad." Coleman said the defendant recorded a rap song "pretty much describing about the five minutes, what happened, how he got away with it." Asked to describe the relationship between the defendant and his codefendants, Coleman said, "[T]he other two follow [the defendant's] lead. . . . [T]hey just do pretty much anything that he say." On cross-examination,

Coleman acknowledged that he had given a statement to Officer Freeman on May 16, 2003, and that “Trick Face” had already told him about the murder before the defendant told him about it. Coleman admitted that he had prior convictions for selling cocaine and assault but denied he had been promised anything in exchange for his testimony.

Dr. Frank King, the Hamilton County Medical Examiner, testified that he performed an autopsy on the victim’s body and determined that the cause of death was a gunshot wound to the head. He said the victim also had two stab wounds to the right buttock, two incisional wounds on the back of the right hand, a small cut across the bridge of the nose, and multiple areas of blunt trauma blows, including the face, forehead, back right side of the head, right elbow, the inside of the right arm at the elbow, the left side of the back, and on the backs of the hands. He said that the gunshot wound entered the right side of the victim’s face and also had a stipple injury, meaning that the gun had been fired “close enough to the body so that the muzzle blast reaches and hits against the skin.” Dr. King opined that the victim was alive when all of the wounds were inflicted.

Detective Bill Phillips testified that when Kimberly Morgan identified the defendant in the photographic lineup, she said, “[T]his could be him if his hair was done differently.” Phillips explained that Morgan looked at a lineup of eight individuals “and she said, ‘Well, it’s not any of these seven,’ and she said the one up on the to right, which was [the defendant], she said – and I don’t know . . . what her exact wording was, but basically, This looks like him but the hair’s different.” Detective Phillips said that the photograph of the defendant in the lineup was not “a very recent photo.”

Testifying for the defense, Randall Leftwich, a mechanic, said that he had worked on the defendant’s vehicles in the past and identified a photograph of the defendant’s Monte Carlo. He said he had seen other Monte Carlos in the Harrison Pike area.

Leslie Cory, a Chattanooga attorney and former federal probation officer who was accepted by the trial court as an expert in federal sentencing guidelines, testified that the primary way a federal defendant could receive a sentence reduction was by “downward departure” based on the defendant’s providing substantial assistance in the prosecution of another defendant. She said that although sentence departures were usually imposed at sentencing, there was a specific procedure for a prisoner to receive a downward departure after beginning service of a sentence, but that procedure was less common.

Called in rebuttal by the State, Detective Phillips testified that he was not aware of any benefits being provided for the federal inmates who testified against the defendant.

ANALYSIS

I. Denial of Motion to Suppress Evidence

The defendant argues that the trial court erred in denying his motion to suppress the evidence seized from him because, in his view, there was no reasonable suspicion for the officers to stop him and no probable cause to arrest him.

We review the trial court's denial of the defendant's motion to suppress by the following well-established standard:

Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the trial court's application of law to the facts, as a matter of law, is reviewed *de novo*, with no presumption of correctness. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000). This court may consider the proof at trial, as well as at the suppression hearing, when considering the appropriateness of the trial court's ruling on a pretrial motion to suppress. See State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998) (holding that because the rules of appellate procedure "contemplate that allegations of error should be evaluated in light of the entire record," an appellate court "may consider the proof adduced both at the suppression hearing and at trial").

Finding that the officers had probable cause to arrest the defendant, the trial court denied the motion to suppress, stating:

I think that based on all of the information which was more than quote unreliable witnesses, they had the police officer in the neighborhood who saw the car many times around the same time, one street over, the same car or one very close matching kind of a unique description was seen at the burning car and shots were fired from that car at a witness. All of those circumstances, and then they pull up behind this Monte Carlo and find out, indeed, this is [the defendant] who they anticipated might be driving this car not too far from and not too long afterwards, all giving probable cause for an arrest.

. . . .

This is not based on any reputation. It's based on a lot of combination of things, including Marquis Gardner, including . . . Officer Fugh, including the same car and person who was starting to be developed as a possible suspect being at the

scene of the fire of the victim's car. All of those things tell me that this is not just reasonable and articulable suspicion for detention but for an arrest.

. . . .

. . . I heard all the proof. They were aware of all of that but they were also aware of lots of other things at the time and I find based on everything they knew about it that this was probable cause. It was a lawful arrest and that the search was incident to the arrest.

Testifying at the suppression hearing and at trial, Detective Bill Phillips said that he was told, at the homicide scene, the duplex rented by Marquis Gardner on Newell Street, that Nuriddin had been there the previous night "sizing up" the victim. Gardner said that Nuriddin, the defendant, and Little had been together that night and he believed they had killed the victim. Officer Galen Fugh came to the scene and told Phillips, during the time of the homicide, that he had seen a black Monte Carlo one street over from Gardner's duplex. From previous experience, Phillips knew that the defendant operated a black Monte Carlo.

Officer Galen Fugh testified that he was conducting a traffic stop on June 20, 2001, at about 1:30 a.m. on Carson Street, which was one block from Newell Street, and saw a black Monte Carlo with tinted windows and shiny rims. He saw this same vehicle again at about 3:00 a.m. in the same area. He said the vehicle that was burned on Harrison Pike was gray and had Georgia tags, which matched the description of the victim's vehicle.

Kimberly Morgan, Steve Maddox, and Michael Holloway testified that they were in a van around 3:30 a.m. and came upon a burning vehicle on Harrison Pike, with a dark-colored Monte Carlo with tinted windows parked in front of it. Two men jumped into the Monte Carlo and fired shots toward the van. At trial, Morgan identified the defendant as the driver of the Monte Carlo.

Officer Jerome Halbert testified that Gardner told him that, the day before the homicide, Nuriddin had been "sizing up" the victim at Gardner's house and the BOLO for the defendant and the black Monte Carlo was issued in part because of Nuriddin's association with the defendant.

Officer James Avery testified that he and another officer who was training him at the time saw the black Monte Carlo, which matched the description of the vehicle in the BOLO, parked at the pump of a gas station at 23rd and Dodds Streets. As the defendant got out of his car and walked toward the officers, Avery saw a "big wad of money" in one of the defendant's pockets.

The two items which were the subject of the motion to suppress were the "big wad of money" and a cell phone, both of which were on the defendant's person as he was spotted by and then walked toward the officers at a gas station. The trial court found that the officers had probable cause to arrest the defendant and seize these items. As we will explain, we agree.

A lawful custodial arrest is justified upon a showing of probable cause to believe that a crime has been committed and that the suspect of the investigation committed that crime. See Tenn. Code Ann. § 40-7-103(a)(4) (2003) (“An officer may, without a warrant, arrest a person: . . . (4) On a charge made, upon reasonable cause, of the commission of a felony by the person arrested[.]”). Probable cause has been construed by our supreme court as existing “if the facts and circumstances within the officer’s knowledge at the time of the arrest, and of which the officer ‘had reasonably trustworthy information sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.’” State v. Henning, 975 S.W.2d 290, 300 (Tenn. 1998) (quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964)).

In this matter, Detective Bill Phillips had been told at the scene of the homicide that Nurridin had “siz[ed] up” the victim, who had a large amount of money, before the homicide and had been with the defendant and Jereme Little the night of the homicide; Phillips knew that the defendant operated a black Monte Carlo; such a vehicle with dark-tinted windows had been seen in the vicinity at the time of the homicide; and such a vehicle with two men inside had been in the vicinity where the victim’s car was seen burning and had fired shots at witnesses; and the defendant and this vehicle were seen later at a gas station in the vicinity, a large wad of cash being visible in the defendant’s pocket as he walked toward the officers. From all of this, we conclude that the trial court correctly determined that probable cause existed for the arrest of the defendant. Thus, the officers had the right to search him and seize the telephone and cash. See State v. Cothran, 115 S.W.3d 513, 525 (Tenn. Crim. App. 2003). The defendant’s claim that the trial court should have granted the motion to suppress is without merit.

II. Expert Testimony by Police Officer

The defendant next argues that the trial court erred in allowing Investigator Warren to testify as an expert regarding the scrape marks found on the undercarriage of the defendant’s car. He contends that the officer’s opinion “as to the age of the scrape marks was nothing more than speculation. His conclusions were not based on a scientifically reliable methodology.” The State counters that the trial court properly allowed Investigator Warren to render an expert opinion about the scrape marks.

Expert testimony must be both relevant and reliable. State v. Stevens, 78 S.W.3d 817, 832-33 (Tenn. 2002). In McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997), our supreme court provided the following non-exhaustive list of factors for a trial court to consider in determining the reliability of scientific evidence or expert testimony:

(1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether . . . the evidence is generally accepted in the scientific community; and (5) whether the expert’s research in the field has been conducted independent of litigation.

Id. at 265. In Stevens, our supreme court concluded that the McDaniel factors could, in an appropriate case, be applied along with other factors in determining the reliability of nonscientific expert testimony:

Consequently, when the expert's reliability is challenged, the court may consider the following nondefinitive factors: (1) the McDaniel factors, when they are reasonable measures of the reliability of expert testimony; (2) the expert's qualifications for testifying on the subject at issue; and (3) the straightforward connection between the expert's knowledge and the basis for the opinion such that no "analytical gap" exists between the data and the opinion offered.

Stevens, 78 S.W.3d at 834-35. Before reaching that point, however, "the trial court must first make a determination that the witness is qualified by knowledge, skill, experience, training or education to express an opinion within the limits of the expert's expertise. The determinative factor is whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." Id. at 834 (citations omitted).

During a jury-out hearing, Investigator Warren was questioned about his qualifications. He testified that he had worked for the Chattanooga Police Department for nine years, had received certification as an accident reconstructionist in 1998, and had testified as an expert in accident reconstruction on previous occasions. In 2002, he became "an instructor in the basic level and the advanced accident investigation," teaching other police officers how to become investigators. Warren also received additional training in computer diagraming and computer forensic animation and had been a guest speaker at several accident reconstruction seminars. He said that he had been an instructor and was considered an expert in the field of photogrammetry, which he explained as "a form of measurements using cameras and then measuring the distances of the pixels in the picture, comparing them to a known distance on the scene." He said he was a member of an international organization of accident reconstructionists and had offered opinions on the subject of photogrammetry. Warren said that he was a POST certified instructor and had taught accident scene investigation classes for multiple agencies. Prior to becoming a police officer, he had worked as a mechanic in several shops and had been a supervisor at an auto repair shop.

Investigator Warren further testified that he had received much training in "reading the roadway evidence on the scene" of an accident and that he used gouge marks "to place the direction of the vehicle, its path, its trajectory, impact points" in reconstructing a crash. As to gouge marks and tire marks, Officer Warren said:

I had to become really familiar with and identify gouge marks, what to look for on the undercarriage of a vehicle, how to match it up, so that way when I reconstruct a crash I know what part of what vehicle caused a particular gouge mark that help me line up the vehicles later on to reconstruct a crash. Gouge marks and tire marks are probably our bread and butter as far as reconstructing crashes.

Investigator Warren said that he had studied the photographs of the defendant's vehicle and observed "fresh scrape marks" on the undercarriage, opining that the marks had been made "[w]ithin a week to that day" of when the photograph was taken. Asked on cross-examination to explain the type of science involved in determining the freshness of scrape marks, Warren said, "Basically, it's just a matter of observation over the years, investigating crashes." He explained that unexposed metal would receive surface rust from the moisture in the air and that surface rust appears in "just a matter of days."

After hearing arguments of both counsel, the trial court ruled that Investigator Warren could testify about the scrape marks on the undercarriage of the defendant's vehicle, finding that allowed by Tennessee Rule of Evidence 702. The court explained that Investigator Warren's proffered testimony was "based on lots of types of experience and training that may not quite be called a science but certainly is a specialized form of knowledge and training that most jurors are not going to have."

We review the admission of expert testimony by an abuse of discretion standard, as explained by our supreme court in State v. Reid, 91 S.W.3d 247 (Tenn. 2002):

The standard of review on appeal is whether the trial court abused its discretion in excluding the expert testimony. The abuse of discretion standard contemplates that, before reversal, the record must show that a judge "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining."

Id. at 294 (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999)).

The record shows that the trial court carefully considered the training and qualifications of Investigator Warren, and the conclusions which he drew from his examination, the court determining that this testimony was admissible. Following our review of the record, we cannot conclude that the trial court abused its discretion in this decision.

III. Admission of Witness's Tape-Recorded Statement

The defendant argues that the trial court erred in allowing the jury to hear the tape-recorded statement of one of the aggravated assault victims, Steve Maddox, because he was unable to cross-examine Maddox about the statement due to the witness's lack of memory. The State counters that the trial court properly allowed the statement given by Maddox at the time of the offenses because Maddox testified at trial that he could not recall his statement.

At trial, Maddox testified that he did not have a clear memory of the facts of the incident, that he had listened to the statement he gave the police after the incident, and that the statement was accurate "[a]s far as I can remember, yes, sir." Over the objections of defense counsel, the trial court allowed the statement to be played for the jury.

Maddox acknowledged making a statement to the police regarding the incident and said it was accurate “[a]s far as [he could] remember.” However, at trial, he testified what he could remember of that morning was that he “just got in the van, headed to the motel, seen a car on fire, didn’t have a fire extinguisher, seen another car there and then we left and went to the motel.” The State then argued that, by virtue of Tennessee Rule of Evidence 803(5), the tape recording of Maddox’s statement should be played for the jury, although not made an exhibit. Determining that the statement would not include an identification of the defendant by the witness, the court agreed and allowed the jury to listen to the tape.

Tennessee Rule of Evidence 803(5) explains how a prior recorded recollection of a witness may be used at trial:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The Advisory Commission Comment to this subsection explains the showing which must be made before the prior statement of a witness may be used to refresh at trial the recollection of the witness:

The proposed rule recognizes the traditional Tennessee hearsay exception for past recollection recorded, but it expands common law in two respects. It allows the admissibility of the contents of a document reflecting past recollection recorded even though the witness has some recollection of the recorded facts but not enough to testify “fully and accurately.” Second, it permits the witness to adopt a record made by another not acting under the witness's supervision. The safeguard is the requirement of adoption at the time when the witness could vouch for the document's correctness.

In this matter, before allowing the statement to be read to the jury, the trial court determined that the recorded statement accurately reflected what the witness recalled shortly after the incident, that the witness had little present memory of the incident, and only recounted facts but did not identify the defendant. Accordingly, we conclude that the trial court did not abuse its discretion in concluding that the statement of Steve Maddox could be read to the jury. Even if the court had erred in this regard, the error would have been harmless, for the statement was virtually duplicative of the testimony of Kimberly Morgan and Michael Holloway, and the witness did not identify the defendant. See State v. Robertson, 130 S.W.3d 842, 862 (Tenn. Crim. App. 2003).

IV. Admission of Photograph of Deceased Victim

The defendant argues that “[a]s a result of the cross-examination [of Marquis Gardner] the State sought and the trial court allowed the admission of a graphic and gruesome photograph of the deceased.” According to the defendant, the “photograph was not necessary to be introduced to the jury and that the probative value of the photograph was outweighed by the prejudicial effect.” The State counters that the defendant has waived this issue for failure to make appropriate references to the record or cite any authority in support of his position.

After defense counsel cross-examined State’s witness Marquis Gardner as to how he knew the victim was dead and whether he had checked the victim’s pulse, the State sought to introduce photographs depicting how the victim looked when Gardner discovered him. Officer Fugh then testified, in a jury-out-hearing, that the photographs depicted how the victim looked when he arrived at the scene. In ruling that two of the photographs were admissible, the trial court stated:

As I look at these photos, one thing I have to think about is the prejudicial effect and the probative value.

The State’s theory is not that the defendant Bailey on trial went into the house and did any of this, he was in the car waiting. So I have to fact that in when I consider as to [the defendant] whether or not this is more probative or more prejudicial. I am going to allow one photo, argument is over, one photo. Because I find one photo, given the testimony and the cross examination of Marquis Gardner outweighs the prejudicial effect on this defendant Bailey. I am going to allow this one given the situation and the cross examination of Gardner.

....

I am going to allow those two. I thought that was already in. Those two. Two out of those.

....

Argument is over. I have done the weighing and I find the probative value of those two outweigh the prejudicial effect in this case.

The admissibility of photographs generally lies within the sound discretion of the trial court, and will not be overturned on appeal absent a showing that the trial court abused its discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). “Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases.” State v. Morris, 24 S.W.3d 788, 810 (Tenn. 2000). In determining whether a photograph is admissible, the trial court must first determine whether it is relevant to a matter at issue in the case. See Tenn. R. Evid. 401; State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998); Banks, 564 S.W.2d at 949. The court must next consider

whether the probative value of the photograph is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .” Tenn. R. Evid. 403.

We have examined the photographs which are exhibits in this matter, and, by our count, there are six color photographs of the body, or parts thereof, of the victim. We note that the trial exhibits also include a number of color photographs showing close-up views of the victim’s wounds. The State argues, and we agree, that the defendant has waived this issue by not identifying the specific photograph upon which this claim is based. See Tenn. R. App. P. 39(a); Tenn. Ct. Crim. App. R. 10(b). Even if not waived, the claim would be without merit because other color photographs of the victim’s dead body apparently came into evidence without objection by the defendant.

V. Instruction on Natural and Probable Consequences Rule

The defendant argues that the trial court erred in not instructing the jury on the natural and probable consequences rule for first degree murder and felony murder. The State responds that the trial court properly instructed the jury.

The trial court gave the following instruction as to criminal responsibility:

A defendant is criminally responsible as a party to a criminal offense if the offense was committed by the defendant’s own conduct, by the conduct of another for which the defendant is criminally responsible, or by both. Each party to the offense may be charged with the commission of the offense.

A defendant is criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the defendant solicits, directs, aids, or attempts to aid another person to commit the offense.

Before you find a defendant guilty of being criminally responsible for said offense committed by the conduct of another, you must find that all the essential elements of said offense have been proven by the State beyond a reasonable doubt.

In State v. Howard, 30 S.W.3d 271 (Tenn. 2000), our supreme court set forth what the State must prove beyond a reasonable doubt in order to impose criminal liability based on the natural and probable consequences rule: “(1) the elements of the crime or crimes that accompanied the target crime; (2) that the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39-11-402; and (3) that the other crimes that were committed were natural and probable consequences of the target crime.” Id. at 276.

In this matter, the target crime was robbery or attempted robbery and the defendant was convicted of felony murder as the result of his participation in this offense, and convicted, as well, of first degree premeditated murder, because of the death of the victim. The defendant argues that

the trial court should have given the natural and probable consequences instruction as to felony murder. In fact, we held to the contrary in State v. Mickens, 123 S.W.3d 355 (Tenn. Crim. App. 2003), in explaining the unique status of a felony murder charge:

“Two striking exceptions to the general rules [of the “natural and probable” consequence rule of accomplice liability] discussed above are felony-murder and misdemeanor-manslaughter, for they do permit conviction for a homicide occurring in the execution of a felony or dangerous misdemeanor without any showing that the defendant intentionally, knowingly, recklessly, or even negligently caused the death.”

Id. at 370 (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 6.8(b) (1986)). This conclusion was repeated in State v. Winters, 137 S.W.3d 641, 659 (Tenn. Crim. App. 2003). Thus, the case law is clearly contrary to the defendant’s argument as to felony murder, and this claim is without merit.

As to the defendant’s claim that the trial court should have instructed as to natural and probable consequences on the charge of first degree premeditated murder, we agree, as our supreme court made plain in Howard, 30 S.W.3d at 277. Our supreme court further instructed in Howard, 30 S.W.3d at 277 n.6, that failure to instruct the jury as to the natural and probable consequences rule, when the evidence so warrants, is constitutional error and subject to harmless error analysis. In Howard, after closing hours, four masked perpetrators entered a restaurant, where one shot and killed the manager as the group robbed it. Howard claimed in a statement that he remained at the back of the restaurant, knowing that the others intended to rob it, but did not aid them. Given this proof, our supreme court could not conclude that the failure to charge the natural and probable consequences rule was harmless. Subsequently, in State v. Richmond, 90 S.W.3d 648 (Tenn. 2002), the court considered the consequences of the trial court’s failing to instruct as to the natural and probable consequences rule as to the defendant’s conviction for attempted first degree murder. As in Howard, the target crime was robbery. However, the court explained in detail why the court’s failure to properly instruct the jury in Richmond was harmless error:

[U]nlike Howard, where the evidence of the defendant's intent was sharply contested, the evidence here unquestionably established that defendant Richmond shared the intent of his fellow assailants and actively participated in every facet of the armed robbery and subsequent shootings. The assailants, including the defendant, approached the victims with at least three weapons, one being a fully automatic Uzi sub-machine gun. Shervon Johnson twice ordered his fellow robbers to kill the victims, and finally attempted to do so himself. Defendant Richmond stood, at most, a few feet from Mr. Johnson when he ordered his confederates to shoot the victims. He furthermore positioned himself so as to offer immediate assistance should the need arise. Testimony established that defendant Richmond drove the getaway car in such a manner as to allow his co-assailant, Shervon Johnson, to fire indiscriminately in the direction of the club. Defendant Richmond then led police officers on a dangerous high speed chase through Knoxville housing projects. The

defendant's role was such that the trial court properly charged, and the jury found him criminally responsible for the actions of his confederates. As such, we are convinced, and the jury so concluded, that defendant Richmond shared the same criminal intent as his confederates and clearly aided them in the completion of the target and collateral crimes. We therefore conclude that the attempted first degree murders of Mr. Cuxart and Mr. Brown were undoubtedly natural and probable consequences of the aggravated robbery. We therefore hold that the trial court's failure to instruct the jury on the natural and probable consequences rule did not, beyond a reasonable doubt, affect the outcome of the trial.

90 S.W.3d at 658.

We conclude that the facts of the present appeal are like those of Howard. The bulk of the State's proof as to the charge of first degree premeditated murder came from the testimony of Brian Herman ("[W]e killed us a real 'em (phonetic), my soldiers took care of that."); Justin Hill (Little and Nuriddin went into the house to rob the victim, "[o]ne of them stuck him and Mr. Little shot him in the head"); and Eugene Coleman (the defendant drove Little and Nuriddin to the house where the victim was and they went inside and robbed him of about \$27,000). Given the sketchiness of the defendant's admissions to these three witnesses, we cannot conclude beyond a reasonable doubt that, had the jury been instructed as to the omitted charge during the instructions for this offense, the verdict would have been the same. Accordingly, the error was not harmless, and this conviction must be reversed and remanded for a new trial.

VI. Sufficiency of the Evidence

The defendant argues that the evidence is insufficient to support his convictions, claiming, specifically, there was no evidence that a robbery occurred and no physical evidence or eyewitness linking the codefendants to the murder.

In considering this issue, we apply the rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

The defendant was convicted of first degree premeditated murder, first degree felony murder, aggravated assault, and setting fire to personal property, and the trial court merged the two murder convictions. First degree murder is defined as the “premeditated and intentional killing of another.” Tenn. Code Ann. § 39-13-202(a)(1) (2003). “[P]remeditation” is an act done after the exercise of reflection and judgment” and “means that the intent to kill must have been formed prior to the act itself.” Id. § 39-13-202(d). “‘Intentional’ refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Id. § 39-11-106(a)(18). A person commits aggravated assault, *inter alia*, when the person intentionally or knowingly causes another to reasonably fear imminent bodily injury by the use or display of a deadly weapon. Id. §§ 39-13-101(a)(2), -102(a)(1)(B). A “[d]eadly weapon” specifically includes “[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury.” Id. § 39-11-106(a)(5)(A). Setting fire to personal property or land is defined as:

(a) A person commits arson who knowingly damages any personal property, land, or other property, except buildings or structures covered under § 39-14-301, by means of fire or explosion:

(1) Without the consent of all persons who have a possessory or proprietary interest therein; or

(2) With intent to destroy or damage any such property for any unlawful purpose.

Tenn. Code Ann. § 39-14-303(a) (2003).

The facts taken in the light most favorable to the State showed that on June 19, 2001, the day before his death, the victim went to the residence of Marquis Gardner, where Nuriddin saw him counting his money and later told Gardner that everyone knew the victim had come to Chattanooga with “a lot of money.” Gardner left the victim at his residence around 11:30 p.m. and when he

returned at about 4:00 a.m., he found the victim's body and called the police to tell them of the death. At 1:30 a.m. that same morning, Officer Galen Fugh saw a black Monte Carlo with tinted windows on Carson Street, which was one block from Newell Street where Gardner's residence was located; and he saw the vehicle again at 3:00 a.m. in the same area. During the early morning hours of June 20, Kimberly Morgan, Steve Maddox, and Michael Holloway, at a time estimated by Holloway to be around 3:30 a.m., were traveling in a van down Harrison Pike when they saw a vehicle on fire and a dark-colored Monte Carlo with dark-tinted windows. Two men jumped into the Monte Carlo, firing shots at the van. The Buick which was burned was that of the victim and had burned as the result of arson.

Officer Jerome Halbert testified that Gardner told him that, on June 19, Nuriddin had been at Gardner's house, "sizing up" the victim. Halbert then put out a BOLO on the black car. Evidence showed that Nuriddin's telephone number was 423-314-3255. Investigator Joe Warren testified that, in his opinion, the undercarriage of the Monte Carlo had caused the gouge marks on the roadway near where the victim's car burned and the marks had been made "within a week or so [of the Buick being burned], within a few days, something along those lines."

Three inmates testified on behalf of the State. Brian Herman said he had known the defendant for ten to fifteen years and the day after the victim's death, the defendant had told him "That Tony Mac boy he through, he'd dead, he's 'stanking,' he's gone." Later, he heard the defendant recording a song "about killing somebody." Justin Hill testified that the defendant told him of the murder in which he was involved, the defendant saying that he, "Jereme Little and Muhammed [Nuriddin] went to rob [the victim] and Mr. Little and Mr. Muhammed went in the house and proceeded to rob him." The defendant told Hill that Little shot the victim, Nuriddin stabbed him, and they drove the victim's car from the scene and burned it. Eugene Coleman testified that the defendant told him that he had driven Little and Nuriddin to the house where the victim was and the two went inside, robbed the victim, and "messed him up real bad." Although the defendant argues on appeal that these witnesses were not credible, the jurors concluded otherwise, as was their right.

Dr. Frank King, the Hamilton County Medical Examiner, testified that the victim died as the result of a gunshot wound to the head and had four knife wounds and a cut on the bridge of his nose, as well as multiple areas of blunt trauma.

We now will apply these facts with the elements of the individual crimes of which the defendant was convicted.

As to felony murder, the evidence easily supports the defendant's conviction. Brian Herman, Justin Hill, and Eugene Coleman, all three of whom were incarcerated at the time of the trial, testified in various fashions as to the defendant's admission of his involvement in the robbery and murder of the victim. From this, a reasonable jury could have found the defendant guilty of felony murder. His vehicle was at the scene where the victim's car was burning, and he was identified as

shooting at three witnesses. From this proof, a reasonable jury could have found him guilty of the three counts of aggravated assault, as well as of setting fire to personal property.

As for the defendant's conviction for first degree premeditated murder, we previously have reversed this conviction and remanded it for a new trial. Because the jury instructions were incomplete as to this offense, we will not determine the sufficiency of the proof as to it. See Howard, 30 S.W.3d at 277.

CONCLUSION

Based upon the foregoing authorities and reasoning, we reverse the defendant's conviction for first degree premeditated murder and remand for a new trial, affirm the remaining convictions, including that for felony murder, and remand for resentencing as to the setting fire to personal property conviction.

ALAN E. GLENN, JUDGE